APR 8 1940

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 930

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

v.

HELEN RICHARDSON,
Respondent.

PETITION [illegible]
To the United States [illegible]
[illegible]

BRIEF IN SUPPORT [illegible]

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In the Supreme Court of the United States

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No. .....

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

v.

ELMER RICHARDSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The Chesapeake and Ohio Railway Company, a corporation of the State of Virginia, petitions this Court to issue its writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on January 10, 1941, in cause No. 8388 in said court, wherein this petitioner was appellant and the respondent was appellee.

SUMMARY STATEMENT OF MATTER INVOLVED.

This action was brought by Elmer Richardson in the United States District Court for the Northern District of Ohio, Eastern Division, under authority of the Federal Employers' Liability Act (U. S. Code, Title 45, Secs. 51-59) against The Chesapeake and Ohio Railway Company, to recover damages for personal injury consisting of the loss of an eye. The case was tried to a jury, which returned a verdict of $6,000.00 for the plaintiff, on which verdict the trial court rendered judgment. The judgment was affirmed by the Circuit Court of Appeals for the Sixth Circuit.

Richardson's amended petition (R. 2-4), on which the case was tried, sets forth that on April 6, 1937, he was required in the course of his employment to aid in the operation of cutting a steel rail with a chisel, during which operation a large sliver of steel was thrown off from the rail and struck him in the right eye, injuring the eye so badly that it had to be removed. The petition alleged negligence by the company in numerous respects, all of which were eliminated by the court from consideration by the jury except that of "failing to hold up the cutting operation until he" (Richardson) "had had a reasonable opportunity of getting into the clear so as to avoid the risk of injury from flying chips." (R. 48, 49, 55.) The company's answer (R. 5) admitted plaintiff's employment and injury and denied that it was negligent and that its negligence caused the injury. It further pleaded assumption by plaintiff of the risk of the injury complained of.

The following facts relative to the accident appear in evidence, without dispute except as otherwise indicated:

At the time of the accident, Richardson had been in the employ of the company about nine years, in an "extra gang" working on the track at various places. (R. 18.) He had on previous occasions worked at cutting rails (R. 21), he knew that chips frequently flew from the rails during that process, and had commented on the unusually large number of chips coming off the rails on which the crew had been working for a day or two before the accident. (R. 29.) On the day of the accident he was working with three other men who were cutting a rail with sledges and a chisel. The rail was lying on the ground in the "devil strip" between two tracks, with one end supported by an angle bar which raised it some three inches from the ground. One of the men held a chisel upon the rail at the point where it was to be cut, directly above the angle bar, while the other two struck the head of the chisel alternately with 10-pound sledges. Richardson's duty was to turn the rail so that the

upper part, or ball would be exposed, and to adjust it "workwise" on the angle bar. (R. 18.)

The company required the three men immediately engaged in the cutting operation to wear goggles, and furnished the goggles. (R. 36.) Goggles were not furnished to men doing the kind of work Richardson was doing. (R. 28.) Instructions were issued for men not immediately engaged to "move themselves from the scene" or "turn their backs to the operation," as testified by the division engineer. (R. 36.) Richardson (R. 20) testified that the foreman had instructed him to get back in the clear, and the foreman (R. 45) and two members of the cutting crew (R. 30, 45, 46) testified that the foreman had instructed the crew not to start cutting until Richardson was in the clear. All of these witnesses gave estimates as to the distance at which one would be safe from flying chips, but only the division engineer testified (R. 36, 37)—and apparently he was the only witness asked,—about the standing instructions to turn the back as a means of protection.

Richardson, having adjusted the rail, was walking away with his back to the operation, and had walked about 18 to 20 feet when he heard the men with the sledges begin to strike. (R. 18, 19.) After he had heard them strike "three or four times—something like two or three, I don't know" (R. 23) he turned around, and as he turned he was struck in the right eye by a flying chip of steel. (R. 19.)

The evidence was in conflict as to Richardson's purpose in turning. He had, shortly after the accident, stated (R. 35) that he turned to see whether the rail had slid and his attention was needed again. He testified on direct examination that he "started to turn around to see what they were doing." (R. 19.) He also testified that he intended to "tell them to wait till I got farther away," but did not actually tell them anything. (R. 19.) Whatever his purpose may have been, it is clear from the record that he must have turned deliberately, after hearing from two to four sledge-hammer blows which, as he said, were not

struck rapidly (R. 23), and after figuring that the blows were struck by the crew he had been helping. (R. 23.) There was no testimony that he turned involuntarily or as a result of being startled, or under the stimulus of sudden peril. On the contrary, Richardson's own uncontradicted testimony excludes such a possibility.

The defendant moved, at the close of the plaintiff's evidence (R. 30) and again at the close of all the evidence (R. 46), for a directed verdict in its favor, on the ground that the plaintiff knew of and assumed the risk of the injury he suffered; which motions the court overruled.

Before argument, the defendant requested the court to include in his charge to the jury the following instruction (R. 46):

> "If you find from the evidence that Richardson was an experienced employee in the kind of work in which he was engaged at the time of the accident; that he had himself participated in the operation of cutting a rail with chisel struck by a hammer, and knew that chips were likely to fly during the said operation; and that there was danger of injury to the eye if it were exposed to such flying chips; then I say that if he turned his face towards the work, knowing that the operation of striking the chisel was going on and likely to be continued, he assumed the risk of the injury which was likely to occur and did occur, and that your verdict should be for the defendant."

The court did not include this instruction in its charge either literally or in substance. On the contrary, the court's instruction on the subject of assumption of risk included the following passage (R. 51):

> "But if, after the distance of 18 to 20 feet, Richardson turned around, knowing that the cutting operation had commenced, *and believing himself in the clear,* he must be held to have assumed the risk." (Italics ours.)

The court also, in its charge on the subject of negligence, made distance the criterion of danger, saying in part (R. 52):

> "*Just what distance away* was considered 'in the clear,' that is, a *sufficient distance* away to escape the risk and hazard of flying chips and slivers, is not definitely fixed in the evidence. Richardson testified that 30 to 35 feet was his notion of *a reasonably safe distance.* If it was the instruction and understanding that Richardson was to be given an opportunity of *getting in the clear,* and the cutters failed to give him such opportunity to get *to a reasonably safe distance* before cutting, it seems to me it was negligence, and if directly because of it Richardson was injured, he is entitled to recover." (Italics ours.)

It was clear from the record that there was no substantial danger from flying chips except to the eyes. Richardson testified he had never known of a man being hurt by chips hitting him any place. (R. 21, 22.) The division engineer said that chips sometimes inflicted minor injuries in other portions of the body, but that such injuries occurred very seldom. (R. 38.) Obviously turning one's back protected his eyes at least as completely as moving 40 feet away, and the division engineer testified that the men were instructed either to move away or turn their backs (R. 36) but the court by its charge required the jury to find negligence if Richardson was deprived of the opportunity to get a certain distance away. When we requested the court to correct this error, the court said (R. 56, 57):

> "The Court: I said to the jury that what under all the facts of the case would be 'in the clear' depends upon what you believe from the evidence was a reasonable distance and position to afford safety.
>
> Mr. Wickham: Did you say 'position'?
>
> The Court: Yes—to afford safety to a man doing Richardson's work and exercising due precaution. If you think that does not dispose of it you had better take an exception."

During his closing argument, counsel for plaintiff said (referring to the three men in the cutting crew whom Richardson was helping) (R. 47):

> "There were three men who were right there and knew what happened, and they are their employees. Don't you suppose that if they would contribute a single word that would help them out on that, they would be here testifying?"

Counsel for defendant objected to this argument, and in the colloquy which followed, he asserted (and plaintiff's counsel admitted), that the depositions of these men had been taken by the plaintiff and were in the files; and plaintiff's counsel stated that the men themselves were within the range of the process of the court. (R. 47.) The men were as fully available to plaintiff as to defendant, and so was their testimony.

BASIS OF THIS COURT'S JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is Section 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347 (a)).

The judgment of the Circuit Court of Appeals was entered January 10, 1941. The petitioner on January 27, 1941, filed its petition for rehearing in said court, which rehearing was denied by order entered February 11, 1941.

QUESTIONS PRESENTED.

The following questions are presented on the record in this cause:

(1) Was Richardson's own act, in turning to face the cutting operation, the sole proximate cause of his injury?

(2) Did Richardson assume the risk of injury from flying chips?

(3) Was the trial court's charge erroneous in its definition of negligence or on the subject of assumption of risk?

(4) Was plaintiff's counsel guilty of misconduct preventing defendant from having a fair trial?

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT.

(1) The decision of the Circuit Court of Appeals, in holding that Richardson's turning around to face the cutting operation was not the sole proximate cause of his injury, conflicts with the decision of this Court in the case of

Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732 (1916),

and with the decision of the Circuit Court of Appeals for the Second Circuit in the case of

Vanderveer v. D. L. & W. R. R. Co., 84 F. (2) 979 (1936)

and departs from the law as declared by the Sixth Circuit Court itself in the case of

Hylton v. Southern Ry. Co., 87 F. (2) 393 (1937).

(2) The Circuit Court of Appeals defined the assumption of risk and applied its definition to the undisputed facts of this case, in a manner which is erroneous and in conflict with the applicable decisions of this Court in cases arising under the Federal Employers' Liability Act,—particularly the cases of:

C. & O. Ry. Co. v. Kuhn, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157 (1931);

S. A. L. Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914); and

C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914 (1926).

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